

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE EWING WERLEIN, JR.

STATUS CONFERENCE

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25 PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,
TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

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1 PROCEEDINGS

2 February 22, 2019

3 THE COURT: Let's see, this is Number 18-3368, United
4 States of America and the State of Texas versus the City of
5 Houston; and Bayou City Waterkeeper is Plaintiff intervenor.6 And let's see -- let's see, who is here for the United
7 States of America?

8 MR. DOUGLAS: Nathaniel Douglas, your Honor.

9 MR. HU: Daniel Hu.

10 THE COURT: Thank you.

11 MR. ORDONEZ: Efren Ordonez for EPA, your Honor.

12 THE COURT: For the EPA, all right. Thank you, sir.

13 And then, who is here for the State of Texas?

14 MR. LEDBETTER: Phillip Ledbetter, your Honor.

15 THE COURT: Thank you, sir.

16 For the City of Houston?

17 MS. BAKER: Debra Baker, your Honor.

18 THE COURT: Thank you.

19 And for the intervenor?

20 MS. ICE: Lauren Ice, your Honor.

21 THE COURT: Thank you.

22 And let's see, who are all the others gathered?

23 MR. GEORGE: David George, one of the other attorneys
24 for the city.

25 THE COURT: For the city, all right.

1 MR. GOODWIN: Phillip Goodwin for the city.

2 MR. COLBERT: Win Colbert for the City of Houston.

3 THE COURT: All right.

4 Well, you-all are trying to make it even since
04:26:58 5 they're all suing you, I guess.

6 Okay. Now, this is a status conference. I was
7 urged to have a status conference. So, this is the status
8 conference. So, tell me what the status is. The last I have is
9 a report of February 4th that the parties were very -- well,
10 every time I get a report, they're very close to settlement.

11 But what is the status? You have more meetings in February and
12 -- and so, where are we, please?

13 Mr. Douglas.

14 MR. DOUGLAS: Your Honor, Nathaniel Douglas,
04:27:39 15 Department of Justice.

16 THE COURT: Yes, sir.

17 MR. DOUGLAS: If I can give the Court a little bit of
18 background on --

19 THE COURT: Thank you, sir.

20 MR. DOUGLAS: -- what we're prepared to list in our
21 status reports; but I'd like for the Court to clearly understand
22 how much effort, energy, time, resources the federal government
23 has put into this matter along with the state to bring the city
24 of Houston into compliance with the Clean Water Act.

25 So, we started negotiations with the City of

1 Houston in 2013. There are two types of violations involved
2 here. One is what we call sanitary sewer overflow. This is
3 when transmission pipes that go from people's homes run through
4 the city streets either break or get clogged and water gets
5 discharged from those pipes.

04:28:24 6 THE COURT: You call these what?

7 MR. DOUGLAS: Sanitary sewer --

8 THE COURT: Sanitary sewer pipes?

9 MR. DOUGLAS: Overflows.

04:28:33 10 THE COURT: Are they overflow pipes or sanitary sewer
11 pipes?

12 MR. DOUGLAS: We call them sanitary -- they're sewer
13 pipes, but we call them discharge sanitary sewer overflows,
14 SSOs.

04:28:45 15 THE COURT: All right. And these are the ones that
16 come from the homes and resident apartments?

17 MR. DOUGLAS: Well, the piping that come from -- that
18 run in front of people's homes that transmit sewage from the
19 homes --

04:28:59 20 THE COURT: Yes.

21 MR. DOUGLAS: -- to wastewater treatment plants, come
22 from restaurants, come from other locations.

23 THE COURT: And they go into trunk lines or larger
24 pipes?

04:29:10 25 MR. DOUGLAS: Yes. There are smaller and larger

1 piping.

2 THE COURT: It's that whole system?

3 MR. DOUGLAS: It's the whole system, what you call --

4 THE COURT: All right. And then, the other?

04:29:17 5 MR. DOUGLAS: Is effluent violations. The --

6 THE COURT: And this is where they're putting it into
7 the Bayou or something?

8 MR. DOUGLAS: The wastewater that comes from the homes
9 that go into the pipes and get transmitted to wastewater
04:29:31 10 treatment plants, that wastewater is supposed to be treated so
11 that some of the pollutants that are in that water are taken out
12 or the city doesn't discharge wastewater that contain pollutants
13 above a certain level per permits issued to the city. And the
14 city has been discharging wastewater where the limitations on
04:29:54 15 the pollutants have been exceeded.

16 Those are the two types of violations involved in
17 this case.

18 THE COURT: All right, sir.

19 MR. DOUGLAS: The federal government --

04:30:02 20 THE COURT: This is a very big city.

21 MR. DOUGLAS: It is the fourth largest city in the
22 nation.

23 THE COURT: So, are you looking at a particular area
24 of Houston?

04:30:13 25 MR. DOUGLAS: Citywide.

1 THE COURT: You're looking at the whole city on this?

2 MR. DOUGLAS: The city has 39 wastewater treatment
3 plants throughout the city.

4 THE COURT: 39?

04:30:22 5 MR. DOUGLAS: 39. It also has 6,000 miles plus of
6 sewer lines running throughout the city.

7 THE COURT: 6,000 miles of sewer lines. All right.

8 MR. DOUGLAS: So, San Antonio, by comparison, has, I
9 think, about seven wastewater treatment plants. Houston has 39.
04:30:48 10 So, it's a real large system, and that's one of the reasons why
11 in a few minutes I'll explain to the Court why it's taking so
12 long to get to the point where I think we're about to resolve
13 this case.

14 THE COURT: All right.

04:31:01 15 MR. DOUGLAS: So, we started negotiating in roughly
16 2013. We had numerous meetings, and a lot of time we were
17 spending negotiating was the federal government getting educated
18 on how the system works and discussing with Houston in terms of
19 what are the possible approaches or things that we have to do to
20 address these SSOs and effluent violations.

21 Now, the hurricane came in 2017 --

22 THE COURT: Hurricane Harvey?

23 MR. DOUGLAS: Hurricane Harvey.

24 THE COURT: Yes, sir.

04:31:38 25 MR. DOUGLAS: We had been negotiating for sometime

1 prior to that point. We suspended negotiations when Hurricane
2 Harvey came for a year. We met for the first time after Harvey
3 in August, 2018. We had a meeting actually in March, 2018, to
4 talk about some of the damage that was caused to the city's
5 sewer system because of Hurricane Harvey.

6 But we did have a settlement meeting in August of
7 2018. We made significant progress in getting back to defining
8 the issues and trying to come up with solutions to those issues.
9 We filed this complaint in this matter for the two types of
10 violations that I mentioned in September -- on September 20,
11 2018.

12 We asked the Court for a stay at the same time.
13 The Court issued that stay. Since the Court issued that stay,
14 we've had, at least, four meetings, two days each. Sometimes,
15 they were day and a half, like, they were two days.

16 We've had tons of, what we call, technical calls
17 where technical folks connected to the city that know the way
18 the city system operates as well as technical persons who work
19 for EPA and who work for the state have all been involved in
20 having telephone calls to talk about fixes to the problems in
21 terms of why these overflow SSOs are occurring and continue to
22 occur and why the city is having effluent violations.

23 THE COURT: Let me pause a moment, excuse me, sir, to
24 ask how does the State of Texas get into here, this case, then
25 as a Plaintiff also?

1 MR. DOUGLAS: The city operates the 39 wastewater
2 treatment plants. And each one of those treatment plants has a
3 permit that's issued by the state.

4 THE COURT: Do they have permits from the federal
04:33:40 5 government, also?

6 MR. DOUGLAS: Those permits before 1998 were issued by
7 the federal government. After 1998 -- 1988 -- 1998, they were
8 issued by the State of Texas. They're called Texas Pollutant
9 Discharge --

04:33:58 10 THE COURT: So, pre-1998 they were --

11 MR. DOUGLAS: Issued by EPA.

12 THE COURT: EPA?

13 MR. DOUGLAS: Yes, sir.

14 THE COURT: And then, after, 1998 --

04:34:08 15 MR. DOUGLAS: Issued by the State of Texas.

16 THE COURT: -- the State of Texas issued the permits.

17 MR. DOUGLAS: And I was talking earlier about the
18 wastewater that's discharged from the treatment plants. Well,
19 these permits will identify the pollutants that the city is
04:34:23 20 allowed to discharge from these plants.

21 And these permits will set limitations on the
22 amount of pollutants that can be in the wastewater. And the
23 permits have other requirements, such as regarding sanitary
24 sewer overflows that -- those are not permitted. They're
04:34:44 25 illegal discharges. That's stated in both our complaint and

1 Waterkeeper's complaint that these are illegal discharges.

2 So, your Honor, after you issued the stay and --
3 on September 24th, 2018, we truly committed with Houston,
4 Houston committed with the federal government and the state
5 government to work towards the settlement. And we were
6 continuing settlement talks, not beginning.

7 So, we began to have more focus in our settlement
8 talks; and we had at least three meetings of two days each,
9 numerous conference telephone calls, getting our technical folks
10 for each party together to talk about certain issues. And we
11 have marched through the requirements of the consent decree.

12 And for the most part, we've been trying to
13 negotiate a consent decree that does two things, and that's
14 what's in the complaint. And those two things are what can the
04:35:52 15 City of Houston do and, in our view, what must the City of
16 Houston do to stop these illegal discharges both in terms of
17 these effluent discharges from the treatment plants and also why
18 is the city having sanitary sewer overflows throughout parts of
19 the city, what's causing those SSOs, what should be done about
20 them, how can we stop them.

21 So, in crafting a consent decree, we have been
22 focusing on finding mechanisms, programs, procedures, things
23 that we can agree on where the city will implement measures to
24 attempt to address SSO and effluent violations.

25 We do this all the time. We have various consent

1 decrees with other cities --

2 THE COURT: In various parts of the country?

3 MR. DOUGLAS: -- across the country.

4 So, we've had these meetings. We had our last
5 meeting December 13 -- 12 and 13 in Dallas, Texas, and made good
6 progress in that meeting.

7 I'm not going to go through the elements of the
8 consent decree, but I can tell the Court that one of the
9 problems that the city could be facing in terms of addressing
10 SSOs is some of the piping in the ground is old piping. This
11 piping burst or there are cracks in it. There are blockages
12 when things go down the sewer and rags and things like that get
13 into the piping.

14 And so, the consent decree, one of the things it
15 does is it focuses on what steps the city will take to address
16 what we call the condition of its sewer system; mainly, you
17 know, other things happening where piping -- sewer pipes are
18 blocked. And we are also focusing on things that will be
19 measures the city will take to prevent effluent violations from
20 occurring from the treatment plants.

21 We have identified, for example, in the consent
22 decree a number of things that the city will do, what we call
23 early action measures where the city is going to over a period
24 of several early years, three years or so, implement specific
25 measures to address SSOs and effluent violations; and then,

1 there are longer term measures.

2 So, we have been negotiating in good faith since
3 the Court issued the stay and prior to the time the Court issued
4 the stay; and we have filed three status reports with the Court;
5 and we have said in each one of those reports that the city,
6 state, and the federal government have made progress toward
7 settlement.

8 I can say to the Court today that, because all --
9 each of the parties has been committed to working hard towards a
04:38:48 10 settlement. The city doesn't want to engage in litigation in
11 this matter because it's going to be costly. The citizens of
12 Houston will be cheated because of the fixes. They need to fix
13 these -- the sanitary sewer overflows and effluent violations
14 will be delayed due to litigation.

04:39:07 15 So, that's why we have been pushing hard for a
16 settlement so that we can identify specific steps that can be
17 taken immediately, identify for mid-term, short -- long term
18 that will help address SSOs; and we won't be wasting money on
19 litigation.

04:39:23 20 So, we've been fighting hard to get a consent
21 decree together; and I can say to the Court that -- and we were
22 negotiating today on the few remaining issues. And I can say to
23 the Court today that, if the Court can imagine hundred page
24 document and if the Court can imagine that in that document
04:39:45 25 there is only one issue that the parties disagree on or have not

1 come to an agreement on but have come close to an agreement on
2 and we're still talking; and that is, in all these cases we
3 require that, based on the number of effluent violations that
4 occur with these 39 treatment plants over the years and based
04:40:10 5 upon the number of SSOs and based upon the formula that EPA
6 uses, we calculate a penalty -- a civil penalty number.

7 So, we are -- we have been discussing what that
8 number should be. The US has told the City of Houston what that
9 number should be in our view. Houston is reviewing that number,
04:40:34 10 and my --

11 THE COURT: Houston is doing what?

12 MR. DOUGLAS: Reviewing.

13 THE COURT: Reviewing it?

14 MR. DOUGLAS: The city -- the penalty number that we
04:40:43 15 have given to them.

16 So, if we can reach resolution on the penalty
17 number and a few maybe --

18 THE COURT: Where does that -- where does the penalty
19 go? Who obtains the benefit of that?

20 MR. DOUGLAS: The civil penalty amount that comes to
21 the federal government goes to the US Treasury. So, if we agree
22 on a settlement and -- probably half of the settlement amount
23 would go to the State of Texas and half would come to the United
24 States.

25 THE COURT: Is the money better spent on penalties or

1 on trying to cure all these serious problems that you have
2 described to me?

3 MR. DOUGLAS: I think the answer is both, your Honor.
4 I think that, one, we have built into the consent decree some
5 measures that the city will take to benefit members of the
6 community.

7 THE COURT: I imagine that what you're talking about
8 are very expensive things to correct, these SSOs --

9 MR. DOUGLAS: They are, your Honor.

10 THE COURT: -- and also the effluent violations.

11 MR. DOUGLAS: They are, your Honor. At the same time,
12 we think that money should be spent within the city; and we have
13 built into the consent decree projects that will keep the money
14 in the city in a way. But the Clean Water Act is very clear.
15 It's a federal law that says that, if you violate that law, you
16 are subject to a civil penalty; and that's what we're applying
17 here.

18 THE COURT: Does the statute say what the amount of
19 that penalty is?

20 MR. DOUGLAS: Yes, your Honor.

21 THE COURT: What is this -- what does the statute say?

22 MR. DOUGLAS: The penalty has changed over the years
23 due to inflation; but I think before November 2, 2015, the
24 penalty was 37,500 per day per violation. So, if it was a
25 effluent violation from a plant, 37,500 could attach to that.

1 THE COURT: Well, it would have to be or the city just
2 has to go into bankruptcy because the city doesn't have that
3 kind of money, according to the newspapers. I'm no authority on
4 this at all. But just reading the newspapers that, apparently,
5 we -- the city, apparently, has severe budgetary problems as it
6 is, like every big city in the country, I would imagine.

7 MR. DOUGLAS: Yes. Once again, we're working with the
8 city in terms of what measures it will take. We have tried to,
9 where we can, adopt the approach with the city once they do
0 things in a particular way to help the city out in terms of
1 financial issues.

2 But I can say to the Court that the point at
3 which we are now is that we are -- the only thing that separates
4 us is agreeing on a civil penalty.

5 THE COURT: So, everything else is substantively

1 agreed in terms of the remedial steps?

2 MR. DOUGLAS: Yes, your Honor. I think we're in a
3 position now -- and I was hoping coming down here today that I
4 would be able to tell the Court that we have a full agreement,
5 but we have continued to talk about the civil penalty amount.

6 And we're just going to need a little bit more time to come to a
7 conclusion on that number.

8 The government is very committed to resolving
9 this case as soon as we can, whether it's through settlement --
10 and that is the approach we would prefer -- or if something else
11 has to be done to address the violations here.

12 Your Honor, I've been with this case since 2013
13 and maybe before; and I'm convinced, in working with the city
14 and working with the folks at EPA and working with the state,
15 that we can bring this case to a conclusion within a very short
16 amount of time.

17 Two weeks would be the amount of time that I
18 would ask the Court to consider allowing us to complete this one
19 last issue. I can guarantee the Court that, as of Monday
20 morning and maybe even before, I'll be talking to the city
21 folks, the state about resolving the issue.

22 And it's not like we're getting started. We both
23 have had -- we've both put proposals on the table. So, it's a
24 matter of discussing those and bringing them together to
25 something that we agree upon.

1 THE COURT: All right. Thank you very much, sir, for
2 your presentation.

3 Does the State of Texas have anything to add with
4 regard to the Plaintiff's position?

04:46:19 5 MR. LEDBETTER: Just briefly. Your Honor asked about
6 -- a question about the State of Texas's ability to be a
7 Plaintiff in the lawsuit and --

04:46:36 8 THE COURT: I was just wondering what the interest
9 was; and of course, Mr. Douglas made an explanation as to some
10 of the historical aspects of it.

11 MR. LEDBETTER: Yes, your Honor.

04:46:50 12 It was just -- the State of Texas has a separate
13 set of statutes and regulations that were adopted to implement
14 requirements to the Federal Clean Water Act; and it would have
15 standing on its own right to bring an enforcement action for the
16 very same violations.

17 And in this instance, we have been working
18 cooperatively with the United States to pursue a resolution.

04:47:05 19 THE COURT: So, whatever it is that Mr. Douglas has
20 told me is in quite a very thick, complicated, I gather, or
21 certainly detailed, I should say, consent judgment. The state
22 is so far satisfied that that -- all of that is -- will meet its
23 demands, as well?

04:47:30 24 MR. LEDBETTER: Yes, your Honor. I'm assuming -- we
25 are -- as Mr. Douglas had indicated, we had hoped today we would

1 be able to come into court and --

2 THE COURT: Does the state undertake to procure any
3 separate penalty other than what Mr. Douglas has described as a
4 penalty that he thought would be shared with the state?

04:47:46 5 MR. LEDBETTER: No, your Honor. It would be split.

6 We would be recovering attorney's fees, but that's the only
7 other monetary relief that would be different from the federal
8 government.

9 THE COURT: All right. Anything else?

04:48:00 10 MR. LEDBETTER: I would just reiterate that, under the
11 State of Texas's authority, just like the federal government
12 authority, we would be pursuing civil penalties for the same
13 violations. They would be mandated. And we had hoped that --
14 you know, we thought we were pretty close to being able to
04:48:23 15 provide something to your Honor to report success.

16 THE COURT: All right. Thank you, sir.

17 MR. LEDBETTER: Thank you.

18 THE COURT: All right. Ms. Baker, what's the city's
19 position?

04:48:33 20 MS. BAKER: Thank you, Judge.

21 Well, the city is in agreement with Mr. Douglas's
22 portrayal of our negotiations. They have been very productive.
23 We appreciate the stay opportunity to finish what has been a
24 complicated, long process. Our city system is larger than
04:48:52 25 almost anyone in the country, and we have worked on it very

1 hard.

2 The -- we do have one remaining issue that he
3 talked about; and --

4 THE COURT: You agree that that's the one thing left
04:49:05 5 to be resolved?

6 MS. BAKER: I do agree, yes. The city does agree.
7 And we also agree that, as you aptly divined, it's an extremely
8 complicated, large matter in a large consent decree. It's been
9 heavily engineered with the technical teams from both sides.

04:49:23 10 THE COURT: Are the -- I might ask -- I could have
11 asked Mr. Douglas, too; but he referred to the technical people,
12 also. Are these employees of the EPA and of the City of
13 Houston? Or do you use -- does either side use outside
14 engineers or consultants?

04:49:43 15 MS. BAKER: That's a good question. The answer is
16 both. EPA has technical people on their staff, and they've also
17 had an outside engineering company whose specialty is sewer
18 systems and how waste is dealt with, which is a unique
19 specialty, you might imagine.

04:49:59 20 THE COURT: And any of these experts are the ones that
21 contributed to the information you lawyers need in terms of what
22 is practicable, what can be done, and how to stage remedial
23 efforts?

24 MS. BAKER: Exactly. What kind of fixes, what is the
04:50:14 25 problem. The city also has technical staff in-house and outside

1 consultants. So, it's been heavily engineered. Our negotiating
2 teams each bring ten or fifteen to these meetings. They're very
3 large.

4 And just by way of a little background -- they
04:50:32 5 alluded to it -- a lot of the problem is, what they call, fat,
6 oil, and grease. Houston is a big restaurant city. It gets in
7 our pipes. It clogs it up. People, unbelievably, have managed
8 to put basketballs in the sewer, Barbie dolls.

9 THE COURT: Basketball?

10 MS. BAKER: Diapers. And that clogs things up. And
11 our system is old. I will point out that in the last 30 years,
12 the city has spent close to \$3 billion improving the system. In
13 2016, we finished another billion. And now, we're starting
14 another upgrade in 2019 as a result of this document. Because
04:51:08 15 the system is so large, so complex.

16 THE COURT: Are there bond issues that have been
17 approved by the voters to support that work?

18 MS. BAKER: I think they have to do a rate study to
19 determine that; and of course, there is a concern on -- impacts
04:51:25 20 on low income residents and how people pay their bills; but
21 that's being worked out. And that is one of the issues we come
22 down to the last on the penalty.

23 I will say that the statute --the Clean Water
24 Act, while they have penalties, there is no minimum requirement
04:51:42 25 and that the Justice Department and the enforcing agencies have

1 prosecutorial discretion on penalties. They've negotiated with
2 different cities all over the country, you know, different
3 amounts of penalties; and that is a negotiated thing. And so,
4 that is where we are.

04:52:01 5 THE COURT: All right. Okay. And you share -- and
6 maybe you -- I need to -- I know Mr. Ledbetter and Mr. Douglas,
7 I think, indicated that maybe -- they thought maybe in the next
8 couple of weeks. Do you share that optimism that this can be
9 done within the next couple of weeks?

04:52:26 10 MS. BAKER: Yes, I am optimistic that it can.

11 THE COURT: Does it require then action by the City
12 Council?

13 MS. BAKER: Yes. Both the government side -- the
14 federal government side and the city will have to -- once the
04:52:40 15 document is something that can be recommended, they all have to
16 go up to their management and recommend it. So, our City
17 Council and our mayor would have to review it. My understanding
18 for -- the EPA would have to send it to their senior management,
19 as well.

04:52:54 20 THE COURT: And what -- and I can come back to
21 Mr. Douglas if he wishes to speak on this. But what amount of
22 time is needed for that process?

23 MS. BAKER: I think it varies depending on different
24 cities and councils and that type of thing. The city's
04:53:12 25 intention is to go as quickly as we can to get our approvals,

1 and they will have to speak to the timing on their end. And
2 then, after that, once we are able to lodge with the Court -- of
3 course, there's a 30-day public comment period.

4 And then, I understand that the federal
04:53:28 5 government tends to address any comments that might be had by
6 the public.

7 THE COURT: All right.

8 All right. Can you add anything on that,
9 Mr. Douglas?

04:53:38 10 MR. DOUGLAS: Your Honor, this is a pretty significant
11 case and civil action. So, this is one that, within the
12 Department of Justice, will have to go up to the Associate
13 Attorney General. So, the process for getting approval. We
14 would move it as quickly as we can, but it's hard for me to
04:53:58 15 predict what that amount of time would be.

16 But if the Court said we had "X" number -- 30
17 days or 45 days, I would do everything in my power to make it
18 happen within that time period.

19 The other thing that I will just add is there is
04:54:12 20 a public participation process for the city, the federal
21 government, and for the state. So, once -- let's say, all the
22 principals for the city, the federal government, and EPA and the
23 state approved the consent decree that we submit to them, then,
24 the federal government would -- I would lodge that consent
04:54:36 25 decree with the Court.

12 THE COURT: And then, you leave it to the Court after
13 all of that to determine whether to approve the consent decree,
14 after the comments back and forth have come?

15 MR. DOUGLAS: Your Honor, in the Clean Water Act
16 context, the law is very clear that, after all the good work of
17 the parties to get to that point of having a consent decree and
18 after the public comment period, it's left to your Honor to
19 review that consent decree, the public comments, and determine
20 that the consent decree meets the requirements of law, which is
21 normally a principle of fairness, reasonable, and consistent
22 with the public interest.

23 And we would have to advise the Court why we
24 believe the consent decree meets those requirements.

25 THE COURT: All right. Thank you, sir.

1 Let me ask, Mr. Ledbetter, is -- who for the
2 state needs to make the approval?

3 MR. LEDBETTER: It's the First Assistant Attorney
4 General for the State of Texas.

04:56:21 5 THE COURT: It doesn't have to go to the legislature
6 or some other bureau?

7 MR. LEDBETTER: No, your Honor. We just have to go
8 through the same comment process.

9 THE COURT: All right. Okay. Thank you, sir.

04:56:30 10 All right. Now, let's see, Ms. Ice, do you have
11 any questions to ask as the intervenor?

12 MS. ICE: Yes, your Honor. Thank you. I represent
13 Bayou City Waterkeeper which is a local NGO that's concerned and
14 working to protect the city's and the area's waterways and
04:56:49 15 bayous and the water quality.

16 THE COURT: Yes.

17 MS. ICE: And so, as -- we were granted the status as
18 an intervenor; and as an intervenor, we were hoping for all the
19 rights that the other parties have had in participating in this
04:57:00 20 -- in resolving the city's wastewater problem.

21 So, I do want to emphasize that Waterkeeper's
22 goal is also to resolve the city's wastewater problems and is
23 committed to working with both the EPA and the state and the
24 city in doing so. So, we do not intervene, you know, with the
04:57:15 25 intent to interrupt the discussions or the progress that is

1 being made. And I am very heartened by what I've heard today as
2 far as the progress that has been made.

3 I would like to point out that, from the public's
4 perspective, which is the perspective of Bayou City Waterkeeper,
04:57:30 5 there were years of negotiations where the residents of the city
6 were waiting for news about this proposed agreement that we
7 heard was coming any day, the consent decree; and it was after
8 Harvey hit and there was a stall in those negotiations and those
9 negotiations were not resumed in a timely fashion that
04:57:47 10 Waterkeeper decided to file its notice of intent to sue.

11 THE COURT: Well, you say it wasn't resumed in a
12 timely fashion. But this Hurricane Harvey was, you know, such a
13 devastating storm. I was having a hearing earlier this
14 afternoon where there's so many people like this right now that
04:58:12 15 the lawyer representing this family said they had just now moved
16 back into their house.

17 Their case involves flood insurance, and there's
18 so many thousands -- tens of -- hundreds of thousands, I guess,
19 of people that were just devastated. I've even seen studies
04:58:32 20 dealing with the psychological impact on the people who were
21 flooded and the serious thing it is.

22 I say that because I'm not sure that I
23 immediately have the same response you did when I hear that
24 Hurricane Harvey with the devastation it did caused these
04:58:57 25 parties to back away for awhile before they resumed their work

1 on this. But in any event, go ahead and let me hear you out.

2 MS. ICE: You're absolutely right. And I apologize if
3 I came off sounding insensitive. That is not my intent.
4 Waterkeeper's employees and their members are Houston residents
5 who, you know, were affected and are concerned; and our notice
6 letter that we sent identifying the violations that we were
7 concerned about, you know, intentionally left out any violations
8 we thought could be attributed to Harvey, realizing that that
9 was a really extreme event and that the city --

04:59:17

10 THE COURT: Yes.

04:59:34

11 MS. ICE: -- you know, was struggling to deal with its
12 people first.

04:59:45

13 So, I absolutely acknowledge that. The storm
14 also affected the wastewater treatment system, and this has been
15 an issue that was ongoing well before the storm hit. And the
16 storm also will inform how the city responds in this consent
17 decree knowing that storms like this are going to be more
18 frequent in the future, unfortunately.

19 THE COURT: Well, how do we know that?

05:00:03

20 MS. ICE: Well, we have data from NOAA that says that
21 our flood plains are increasing and the intensity of the storm.

22 THE COURT: Because of the construction there's so
23 much less --

24 MS. ICE: I think just --

05:00:15

25 THE COURT: -- open ground?

1 MS. ICE: I think just because of climate change that
2 the intensity of the storms are going to become more -- more
3 intense and more frequent.

4 THE COURT: Okay.

05:00:26 5 MS. ICE: So, I came here today really to hear what --
6 the progress that the parties are making since it was after
7 Bayou City Waterkeeper filed its notice letter that we have
8 heard that the negotiations have been resumed and that they are
9 -- that there is progress being made.

05:00:44 10 Unfortunately, Bayou City Waterkeeper has been
11 kept out of the settlement negotiations. We don't disagree that
12 settlement is a very positive step here and that litigating
13 would be costly and unnecessary and that settlement is the right
14 way to go and working through this consent decree is the right
05:01:04 15 way to go.

16 But as party to the suit, Waterkeeper would like
17 the ability to participate; and that -- that would be either
18 through litigation or through settlement. And right now,
19 because of the stay and because the other parties are opposed to
05:01:15 20 Waterkeeper participating in the settlement, it's unable to do
21 either.

22 And as we've heard, the consent decree that has
23 been -- that is being worked on, it is going to be hundred pages
24 or more. It's going to be dense and highly complex; and it is
05:01:29 25 something that Waterkeeper and its member are very, very

1 interested in. As a party to the consent decree, they will, you
2 know, be able to help enforce it; and as an enforcing body, they
3 want to make sure that the consent decree is something that they
4 can work with in the future.

05:01:44 5 And right now, we're left on the outside, as the
6 rest of the residents in the city are, not really knowing what
7 to expect and being told that there's a 30-day public comment
8 period in which we can, you know, make our comments.

9 So, we didn't want to lift the stay. We don't
05:01:57 10 want to go to litigation necessarily, but that's why we didn't
11 file a request to lift the stay. And that's, instead, why we
12 filed a request for the status conference. We're hoping that
13 the parties will include Bayou City Waterkeeper in the
14 discussions now early on so that we don't have to come back to
05:02:12 15 the --

16 THE COURT: What would City Waterkeeper -- there's
17 only one thing that the principals have left to resolve, both
18 sides have told me; and that's the amount of the fine. What
19 would City Waterkeeper bring to that conversation that would be
05:02:31 20 of value?

21 MS. ICE: I don't think that -- I'm not sure that
22 Waterkeeper would have an opinion on the penalty because the
23 penalty would not impact us in any way. Waterkeeper would be
24 more interested in the terms of the settlement agreement and
05:02:46 25 whether or not it was designed and fully capable to achieve the

1 compliance of the Clean Water Act that the parties I know are
2 seeking.

3 We -- Waterkeeper has done a lot of -- has been
4 analyzing a lot of the data that is publicly available and would
05:03:01 5 like the opportunity to continue to do that and to provide those
6 comments now rather than way later down the road because, as I
7 said, they do want to work with the city towards that common
8 goal.

9 But a shortened timeline during the public
05:03:17 10 comment period for a party that is this interested in all the
11 little details that are going to come out of that consent decree
12 is just simply not enough time. And this would allow us to talk
13 about those -- to ask those questions and have those
14 conversations ahead of time.

05:03:31 15 So, hopefully, we're not back here in front of
16 the Court, as the parties explained, fighting over the details
17 of the consent decree then; that we can work out some of our
18 differences, if there are any, ahead of time.

19 THE COURT: Tell me a little bit about the Bayou City
05:03:44 20 Waterkeeper. Maybe I should know of your company, but it's a
21 new name to me with your introduction into this case. Is it an
22 engineering firm or --

23 MS. ICE: Oh, no, your Honor. It's a non-profit
24 organization whose mission is to protect the water quality in
05:04:04 25 the Galveston area bays and estuaries.

1 THE COURT: Do they have staffs of employed engineers
2 and the kind of people that the federal -- the EPA has and the
3 city has they've told me about?

4 MS. ICE: The Waterkeeper is a network, and there are
05:04:25 5 Waterkeepers around the country who will share resources in
6 situations like this. They -- I do not believe that Bayou City
7 Waterkeeper has an engineer on staff; although, they do have
8 water quality scientists on their board of directors; and a lot
9 of the work that gets done with a small NGO such as this one is
05:04:45 10 done on a voluntary basis through the board of directors or
11 there are allies who like to help out.

12 So, these are folks who are participating in this
13 process because they have a mission to help, you know, clean up
14 Galveston Bay; and they have a lot of friends and members who
05:05:00 15 would also like to help; and that is what -- and they represent
16 their interest in this case. And so, that is what participation
17 in this would bring to the table, which is a unique interest, I
18 think, than that -- although, there's a line. It's a unique
19 interest than what the city or the federal or state government
05:05:15 20 bring.

21 THE COURT: Okay. All right. Thank you very much.

22 Well, I might ask Mr. Douglas how the city in
23 turn -- how you feel about what Ms. Ice has said, that she would
24 just like to be in the conversation to see what all these
05:05:35 25 details are?

1 MR. DOUGLAS: I mean, I'll say two things, your Honor.
2 The game is over. This is a game where maybe the referee
3 decided to put five seconds on the clock because of something
4 that happened, but the game is over.

05:05:53 5 We have -- and the reason why I went through that
6 history is because I wanted to share with the Court that the
7 City of Houston, the Department of Justice, the State of Texas,
8 EPA have been at this issue since 2013 or before. We have put a
9 lot of effort into it, and we have come to the end of the game.
05:06:14 10 It's over. All we have to do now is resolve the penalty issue
11 and convince our managers to approve the consent decree.

12 Now, your Honor, this comes up in most of these
13 Clean Water Act cases where environmental groups attempt to get
14 involved; and the Courts have made very clear that these
05:06:33 15 environmental groups have an ample opportunity to participate in
16 the settlement process because they get a chance to look at the
17 consent decree. They get a chance to make comments to the
18 governments here, the state, the city, the federal government.

19 They get a chance to make those comments. They
05:06:51 20 can submit whatever they want. We will consider that; and in
21 the end, the Court will get a chance to see what concerns
22 Waterkeeper raised or any environmental group, how we dealt with
23 those, and if we were fair in the way that we dealt with those
24 comments.

05:07:08 25 So, as part of the public participation process,

1 Waterkeeper gets a chance to look at everything we have done
2 under the consent decree, offer this Court, offer all three
3 governments their concerns; and then, this Court will get a
4 chance to see what those concerns are.

05:07:26 5 Your Honor, there is -- and if the Court wants,
6 we can brief this issue. There are a ton of cases that make it
7 very clear that just because you're an intervenor in a case does
8 not give you a right to participate in settlement talks.
9 There's a ton of case law that supports that view.

05:07:44 10 I'll be glad to brief that issue for the Court
11 because those Courts have concluded, as I just said, as part of
12 the public comment period Waterkeeper gets a chance to see
13 everything.

14 Now, I would ask the Court to consider this, too.
05:07:57 15 You asked Ms. Baker the question about who is involved in these
16 discussions. Well, the federal government, when we have these
17 discussions, there are certain legal issues that I address; but
18 I can't even discuss some of the technical stuff that they talk
19 about in these discussions.

05:08:12 20 We have two well-known nationally recognized
21 experts who are the ones sitting down with the city and with the
22 state talking about some of the measures that have to be taken
23 and why those measures should be taken. EPA sends an engineer
24 of ten or twelve years of experience to these meetings to
05:08:33 25 represent EPA's interests and to talk about the kind of

1 measures. These are highly technical discussions. It takes a
2 lot of work and effort, research to bring all this together and
3 try to make decisions.

4 Your Honor, I think that whether it's Waterkeeper
05:08:50 5 or whether it's John Q. Public on the street, if they have an
6 interest in knowing what we did, they'll get a chance to see
7 that and if they have an interest in communicating --
8 communicating with us in terms of disagreeing with "X" or "Y"
9 and providing support as to why they disagree, that is
05:09:10 10 information that we have to consider as part of going through
11 the process. And it's not just me. I have to let my managers
12 know that "X" group raised these concerns. So, the EPA managers
13 get a chance to see what the comments are, as well.

14 Your Honor, when I first got up, I said the game
05:09:29 15 is over. The game is truly over in terms of all the hard work
16 that we have put into this. We have come to a conclusion, and
17 it would be extreme delay on -- in this case if we had to open
18 up discussion or do other things to go backwards in order to
19 convince and show and hear from as opposed to proceeding with
05:09:54 20 this consent decree, being approved by our respective
21 managements, and giving Waterkeeper its entitlement that we give
22 to every other citizen and environment group a chance to
23 participate in the public comment group.

24 In fact, they have three opportunities for public
05:10:14 25 comment. One, the state has a separate public comment period;

1 and Waterkeeper gets a chance to share their comments with the
2 state, the Attorney General's Office. Two, the city has a
3 public participation process; and Waterkeeper gets a chance to
4 share its concerns with the city. The federal government has a
5 separate public participation process. They get a chance to
6 share their concerns with us. So, there's ample opportunity for
7 them to tell this Court why they don't like the consent decree,
8 why the Court may want to consider something else. And that's
9 down the road once we submit the consent decree to the Court for
10 approval.

11 So, there is plenty of time for them to tell this
12 Court that we got it wrong; and the Court should correct it.
13 But I'm convinced that we'll tell the Court we got it right, and
14 the Court should approve the consent decree once we submit that
15 to the Court.

16 THE COURT: Thank you, sir.

17 Did you have something else to say, Ms. Baker?

18 MS. BAKER: Yes. I would agree with Mr. Douglas; and
19 I would just add that the way that the statutory scheme is set
20 up, EPA and the state are the primary enforcers of the Clean
21 Water Act; and while intervenors can come in, their role is not
22 just supplant EPA and the State.

23 So, in this case, you know, the EPA has
24 negotiated these kinds of consent decrees with probably more
25 than hundred cities. Mr. Douglas himself has negotiated 75

1 complex consent decrees. The parties each have engaged
2 engineering firms who are specialists in technical engineering
3 about how we solve problems of engineering and moving human
4 waste through millions of miles of pipe in the flattest city
5 around.

6 And so, I -- you know, I echo what he says in
7 that it is complex. We have negotiated a settlement that we
8 want to recommend to our management. His management hasn't even
9 seen it yet. These are confidential settlement negotiations,
10 and they get -- I think they're entitled to see it before it
11 goes out to the public.

12 And the Bayou City Waterkeeper gets the same
13 rights as the rest of the public and all of the other
14 organizations who want clean water and care about the
15 environment. So, everyone is treated equally. So, I would just
16 add that.

17 Thank you, your Honor

18 THE COURT: All right. Thank you.

19 All right. Ms. Ice, did you have anything else
20 to add?

21 MS. ICE: Yes, thank you. Thank you, your Honor.

22 I would say that it sounds to me as if there is
23 -- if there is an imminent final -- if there is some imminent
24 final language and if it is confidentiality that is holding the
25 parties up from sharing that and simply giving Bayou City

1 Waterkeeper the head start on being able to fully digest what it
2 is that they're proposing that Waterkeeper would be more than
3 happy to sign a confidentiality agreement or enter a protective
4 order so that was something that they could begin reviewing.
05:13:13 5 And I don't see how that would necessarily interrupt the
6 process.

7 I would also say that I don't think we should
8 discount the -- you know, the public participation aspects and
9 how important that is. I realize that there are experts here
05:13:26 10 who have been working on this for years and years; but as
11 everyone has noted, it does have to go through City Council and
12 to the mayor.

13 I would think that they would want the
14 participation of the public, and that's simply what we're here
05:13:40 15 offering and asking for the opportunity to do.

16 THE COURT: All right, thank you.

17 All right. Well, I thank you all for your very
18 excellent presentations and for informing me, giving me a much
19 better picture of where things stand.

20 It does seem to me that, given the
21 representations made by Plaintiffs and by Defendant, City of
22 Houston, that the terms have -- of a consent -- a proposed
23 consent decree has been agreed except for this one outstanding
24 item -- and that is, a recommended fine amount to comply with
05:14:03 25 the statutory requirement for fine -- that -- which they hope,

1 both sides, to reach resolution on in the next couple of weeks,
2 it seems to me that after these years of negotiations,
3 investigation, study, all the engineering, the complexities, and
4 the like and the cost I'm sure that go along with that that it
05:15:13 5 would be in the interest of all the parties, I think, as well in
6 the interest of the public interest company that -- Bayou City
7 Waterkeeper, at this time to try to hold that delicate balance
8 and not do anything to upset the apple cart.

9 Having seen and been a party to some complex
05:15:43 10 negotiations in my years as a lawyer long, long ago, sometimes
11 when you have comprehensive settlements, if one thing changes on
12 one side, then the other side has something else to change. It
13 has to -- they want to give or they want to take; and then,
14 you're back into a negotiating situation. If this is to be
05:16:11 15 changed, then what about that? Or we only agreed to that
16 because we're getting this.

17 And it seems to me that, from what I have heard
18 described, the complexity, the size of this -- I'm a Houston
19 native. I know the size of the city geographically, and that's
05:16:37 20 why I questioned how -- the magnitude of this, and I've been
21 duly impressed.

22 But I can see at this time there -- I am
23 impressed from what has been represented to me by both sides
24 that there's a delicate balance here, and I think it's in the
05:17:00 25 interest of all parties and the public that that be respected

1 and that we see what happens in the next couple of weeks, right
2 in this near term that -- where the parties expect to be able to
3 reach agreement comprehensively.

9 I might ask, Mr. Douglas -- I'm a little bit
10 interested in your experience since, obviously, you've done so
11 many of these. Do you find that the higher-ups in the
12 departments generally go along with your recommended settlements
13 or do you have other experience with that?

20 THE COURT: Yeah. But I'm interested about your past
21 experience which is, obviously, considerable. And that is, have
22 you in the past had success in getting these settlements
23 through?

24 MR. DOUGLAS: Ms. Baker mentioned San Antonio. I
25 negotiated the consent decree there involving its clean water --

1 its sewer system. We got that through the system. I'm also a
2 manager. I supervise other lawyers in my section, the
3 Environmental Enforcement Section; and for the most part, these
4 consent decrees -- you write up the recommendation to the upper
5 manager. You may have to experience or answer some questions;
6 but for the most part, they get approved.

7 THE COURT: All right, thank you.

8 MR. DOUGLAS: Once again, this one has to go to the
9 associate. And we'll have to, you know, speak well to the
10 associate in terms of explaining this consent decree; but I'm
11 optimistic that that will not be a problem.

12 THE COURT: All right. Thank you, sir.

13 And I might ask, Ms. Baker, do you have -- you
14 probably don't have experience having to do this. This seems to
15 be like the one career opportunity for you maybe. But do you
16 expect the City Hall and the mayor and the City Council to be
17 receptive to your work?

18 MS. BAKER: I think -- I would expect ultimately the
19 City would be because this is -- we have such a massive system.
20 This is the third or fourth go-round to renew and rehabilitate
21 our system. They have devoted \$3 billion in the last 30 years,
22 and we had more people than ever using our system. And you
23 know, there is a need.

24 THE COURT: I assume that throughout this process you
25 have been keeping the mayor advised of all of this?

1 MS. BAKER: Generally, yes. The city attorney is
2 certainly my boss.

3 THE COURT: The city attorney.

4 MS. BAKER: I keep him directly informed and the
05:20:21 5 director of public works, as well.

6 THE COURT: Yeah. Okay. Thank you.

7 MS. BAKER: Thank you.

8 THE COURT: Well, in any event, I feel that that -- at
9 this point, I'm persuaded that there's much optimism on both
05:20:37 10 sides and a delicate balance that I think it would behoof all
11 parties to try to respect. And I think that as soon as we get
12 the -- what I hope will be soon the positive word that a
13 comprehensive settlement is prepared, then you'll be going up
14 through the channels; and I gather it's then only a matter of
05:21:02 15 time until the document is put out for public -- for everyone.

16 Is that --

17 MR. DOUGLAS: Your Honor, may I just say that we'll
18 continue to file progress reports. So, we --

19 THE COURT: Well, I hope there won't be more --

05:21:18 20 MR. DOUGLAS: Just to let the Court know things are
21 moving.

22 THE COURT: Oh, yeah, that's right. I hope there
23 won't be more progress reports saying that you're still working
24 on the fine.

05:21:27 25 MR. DOUGLAS: Just to keep the Court informed.

1 THE COURT: Okay. Because I hope you'll have that
2 resolved, both sides. I don't know where you are, I don't know
3 what it is, or anything else. But I'm being sold by you on your
4 optimism and buying into that.

05:21:46 5 All right. But I think that's good to continue.
6 You know, even after that, I certainly want to know how it is
7 and going up the chains of command and so forth; and of course,
8 Ms. Ice will, too, want to know that and when she then can have
9 available for her scientists and specialists on her board to be
05:22:09 10 able to read all of that and provide comments.

11 Okay. Anything else today?

12 (No response.)

13 THE COURT: This has been a very good status report by
14 all parties.

05:22:22 15 MR. DOUGLAS: No, your Honor

16 THE COURT: You've helped me understand everybody's
17 position so much better. I thank you for that.

18 Thank you for suggesting it, Ms. Ice.

19 MS. ICE: Thank you for granting it.

05:22:29 20 THE COURT: All right. Thank you.

21 That concludes this hearing then.

22 (Proceedings concluded at 5:22 p.m.)

23 C E R T I F I C A T E

24 I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter, to
the best of my ability.

25 By: /s/Gayle L. Dye
 Gayle L. Dye, CSR, RDR, CRR

03-05-2019
Date